courts of jurisdiction is fraudulent and will not prevent them from deciding that the controversies are really separable.[13]

If the cause is capable of being treated either as joint or as several it is quite well established that the plaintiff may treat it as joint and his motive for so doing is immaterial.[14] There is no occasion to talk of fraud or improper motive. That issue arises only when the cause can be, not joint, only several. The cases reiterate that good faith in the pleadings will permit the cause to be retained in the state courts; that mere failure to establish a joint liability will not be ground for removal.[15] Yet knowledge is imputed where facts might have been known.[16] Taft, J., said: "Courts are not required to be blind to plain facts. The joinder of a fireman or an engineer or a conductor as defendants in an action to recover $25,000 against a railroad company, without explanation, of itself raises a suspicion that it is not done merely to recover judgment against the employees." [17] And in *Zigich* v. *Tuolumne Copper Mining Co.*[18] the court has held that it is not enough that the plaintiff believe upon reasonable grounds that the defendants are jointly liable to him, but he must set out the grounds so that the court may determine whether or not they are reasonable and sufficient to sustain the belief.

Now nothing can so sustain a belief that an action is joint as the fact that it is, and nothing can weaken that belief more than the fact that it is n't joint. This is practically the test of fraud to be found in the cases. But because improper motive becomes material only when the complaint alleges to be joint controversies which in point of law cannot be, it would seem that in granting a removal the courts must first decide that the non-resident employer is not an essential codefendant with the resident employee. Having held the cause separable, there is no reason to talk of fraud.

RULE AND DISCRETION IN THE ADMINISTRATION OF JUSTICE. — The last two decades have witnessed a series of persistent attacks upon the administration of justice by the courts. The courts of the nineteenth century were unyielding in their faith that justice must be administered in accordance with fixed rules, which could be applied by a rather mechanical process of logical reasoning to a given state of facts and made to produce an inevitable result.[1] One phase of the reaction against this

to removal proceedings, is known by all who have to deal with them." McPherson, J., in Hagerla *v.* Mississippi River Power Co., 202 Fed. 771, 773 (1912). This criticism has been made by Mr. Charles A. Boston in "Removal of Suits from State to United States Courts — A Picture of Chaos Demanding a Remedy," 88 CENT. L. JOURN. 246.

[13] Wecker *v.* National Enameling Co., 204 U. S. 176 (1907).

[14] Chicago, etc. Ry. *v.* Willard, 220 U. S. 413 (1911); Chicago, etc. Ry. *v.* Schwyhart, 227 U. S. 184 (1913); Chicago, etc. Ry. *v.* Whiteaker, 239 U. S. 421 (1915).

[15] Whitcomb *v.* Smithson, 175 U. S. 635 (1900); Kansas City, etc. Ry. *v.* Herman, 187 U. S. 63 (1902).

[16] Wecker *v.* National Enameling Co., *supra*, where, at 185, the court said that "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." This approaches perilously near to "constructive fraud."

[17] See Powers *v.* Chesapeake & Ohio Ry., 65 Fed. 129, 131 (1895).

[18] 260 Fed. 1014 (1919).

[1] See Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.

kind of legal administration appears in the creation of administrative boards and tribunals for handling special problems, — such as determining "reasonable" rates and "reasonable" service by a public service company, fixing the amount of compensation under Workmen's Compensation acts, etc. — for which, it was conceived, the ordinary judicial machinery was too cumbersome or too dilatory.[2] Another phase of the movement appears in the creation of juvenile courts, domestic relations courts, and even municipal courts, which, while preserving the name and many of the characteristics of courts, yet adopt the methods of executive rather than judicial justice.[3] In other words, as compared with ordinary courts, all these tribunals proceed more by the application of a trained intuition to the facts of a particular case, and less by articulate reasoning from stated premises in the form of legal rules or principles.[4]

It is perhaps too early to make a confident evaluation of the effects of these tendencies upon American legal administration. Yet one may feel sure that the ultimately satisfactory solution lies in overhauling and readjusting our legal machinery to meet the present social demands, in a careful study of these new demands and of the means by which to satisfy them, rather than in haphazard blows at the legal institutions which the experience of the past has given us. In this connection it is interesting to note the attempts at legal reform made by Mr. Justice James E. Robinson of the Supreme Court of North Dakota. His actions in giving to the press a weekly letter as to the doings of the court, the number of times each judge is absent from the court, and his manner of writing decisions, have been commented upon elsewhere,[5] and Mr. Justice Robinson has made a reply to these criticisms which indicates that he is acting in good faith.[6]

Mr. Justice Robinson's *bête noire* is the doctrine of *stare decisis*. He rarely cites authorities in his more recent opinions,[7] and he expresses a preference for deciding "every case in accordance with law, reason and justice." Thus, in *Bovey-Shute Lumber Co.* v. *Farmers' and Merchants' Bank of Leeds*,[8] he dismissed in a few sentences and without citation of authority the contention of a banking corporation that a contract of guaranty made by its cashier was *ultra vires* and void. Mr. Justice Robinson says: "When it [the bank] takes a loan on land and on crops, it must have a right to improve the land and to care for the crops. In this case the bank had a perfect right to bargain, as they did, for the construction of a house and granary. It was good business, and it should

[2] See Winslow, "A Legislative Indictment of the Courts," 29 HARV. L. REV. 395; Pound, "Executive Justice," 55 AM. L. REG. (N. S.) 137.

[3] See Pound, "The Administration of Justice in the Modern City," 26 HARV. L. REV. 302.

[4] Speaking of the rulings of an administrative tribunal, Mr. Justice Holmes said: "They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions — impressions which may lie beneath consciousness without losing their worth." Chicago, B. & Q. Ry. Co. *v.* Babcock, 204 U. S. 585 (1907).

[5] See Andrew A. Bruce, "Judicial Buncombe in North Dakota and Other States," 88 CENTRAL L. J. 136.

[6] See "Judge Robinson's Reply," 88 CENTRAL L. J. 155.

[7] Of twenty-two opinions by Mr. Justice Robinson in 175 N. W. and 174 N. W. 1–959, only three contain any citations of previous decisions.

[8] 173 N. W. (N. D.) 455 (1919).

not have led to any litigation." Perhaps it was "good business" for the directors and shareholders of the bank; but how about the depositors, who were not paid for any such risk-taking and whose interests would be jeopardized if the bank engaged extensively in the business of building houses and granaries for its borrowers? The learned justice's opinion shows clearly one of the chief dangers of "administrative" justice, of justice by discretion rather than of justice by rule, namely, the tendency to take snap judgment upon the basis of more obvious and pressing interests, to the neglect of those which are more subtle and far-reaching. Granting for the moment that the decision is supportable, the "reasoning" of the court [9] should not have ignored the judicial experience of the past in solving the problem of *ultra vires* acts of banking corporations.[10]

Brevity in the statement of facts by the court, "so that any child may read and understand it," [11] is another point on which Mr. Justice Robinson insists. Thus, in *Froelich* v. *Northern Pacific Railway Co.*,[12] an action for personal injuries by a railroad employee, Mr. Justice Robinson, writing for the court, stated the facts so briefly and simply that one had difficulty, upon reading his statement, in seeing why the plaintiff's attorneys were so foolish as to bring an action at all, and still greater difficulty in seeing why a jury gave a verdict and a judge gave a judgment for the plaintiff in the trial court. But upon a rehearing, the court, in a "Per Curiam" opinion, gives a statement of the facts twice as long as that of Mr. Justice Robinson. Thus, Mr. Justice Robinson's method of stating facts did not save the people or the lawyers of North Dakota anything in the way of printing or print-paper after all.

But something far more important than saving print-paper is involved in the court's statement of facts. A full, clear, and impartial statement of facts by the court is necessary in order that the legal profession and the public may determine whether the judge has decided the case in accordance with the law or in accordance with his individual caprice. It is not only an important safeguard against the exercise of an arbitrary discretion by a court of last resort,[13] but also an essential part of the decision as a precedent for future guidance.

Another of Mr. Justice Robinson's vagaries is his insistence upon a wide use of "judicial notice." Thus in *Ingmundson* v. *Midland Continental Railroad Co.*,[14] the court reversed a judgment for defendant in an action for damages caused by an alleged nuisance due to the running of defend-

[9] The decision was unanimous, but two of the justices concurred in the result only.

[10] See, for example, Bowen *v.* Needles, etc. Bank, 94 Fed. 925 (1899); Citizens' National Bank *v.* Appleton, 216 U. S. 196 (1910). See also COOK, CORPORATIONS, 7 ed., § 681.

[11] See "Mr. Justice Robinson's Reply," 88 CENTRAL L. J., 155, 156.

[12] 173 N. W. (N. D.) 822 (1919).

[13] Thus, in the case just cited, granting that the decision was proper, no one could tell from reading Mr. Justice Robinson's opinion that the jury had, upon special interrogatories, found the defendant negligent and the plaintiff not negligent, that there was some evidence upon which to base these findings, and that the real issue in the case was whether or not this evidence was sufficient to go to the jury. See the dissenting opinion of Mr. Justice Bronson. In this connection see also Wingen *v.* Minneapolis, St. Paul & S.S.M. Ry. Co., 173 N. W. (N. D.) 832 (1919). It is not meant to be denied that courts have in many instances written statements of facts which are unduly prolix, and cited authorities needlessly. There is no need for going to either extreme.

[14] 173 N. W. (N. D.) 752 (1919).

ant's trains over a right of way adjoining plaintiff's premises. Mr. Justice Robinson, dissenting, says: "The complaint not only fails to state a cause of action, but also it shows that plaintiff has no cause of action. . . . In reading such a complaint the court must take judicial notice of such facts as are commonly known to intelligent persons within the jurisdiction of the court. We must take judicial notice of the fact that defendant does operate a little railroad running south from Jamestown, with small engines and light trains, and not with any such mogul engines and trains as pass over the main line of the Northern Pacific Railway. . . . *In so far as the complaint asserts mere exaggerations which are known to be untrue, it should be disregarded.*" [15] In *England* v. *Townley*,[16] a suit for libel, Mr. Justice Robinson, dissenting, maintained that the complaint did not state a cause of action, saying: "The people are paying less and less regard to such newspaper stuff, so that no one suffers from it, and the courts are no longer disposed to regard mere exaggerations which are manifestly untrue."[17]

Judicial justice implies a right to be heard, which in turn implies a right to be confronted with the facts upon which the tribunal relies in denying one's claim, and to be given an opportunity to rebut them. While an exception is made in the case of facts which are notorious,[18] this does not extend to a judge's personal observation of the particular facts of a case.[19] If the tribunal relies upon its own private knowledge, it in effect prejudges the plaintiff's case and denies him "due process of law."[20] Here again the dangers of discretion untrammeled by rule are obvious.

In fairness, however, it must be said that Mr. Justice Robinson's methods sometimes find their appropriate field. Thus, in questions of fact in divorce cases,[21] and in questions of procedure,[22] the exercise of judicial discretion, within broad limits such as "due process," appears at its best. In the case just cited the court said: "The rule of *stare decisis* is especially applicable to decisions on matters of procedure and practice." Mr. Justice Robinson said: "I do strenuously dissent to the building of error upon error. I concur in the result, but not in the reasoning of the court or the *stare decisis*." It is submitted with deference that if there is any field in which the doctrine of *stare decisis* is least important, it is in the field of procedure. No man can acquire a vested right in his opponent's procedural error.

On the whole, one who is in warm sympathy with legal reform may

[15] Italics ours. Note the way in which Mr. Justice Robinson, after laying down the rule as to facts of common knowledge, applies it to facts derived from his personal observations.

[16] 174 N. W. (N. D.) 755, 758 (1919).

[17] The appeal was from an order overruling a demurrer to the complaint, hence there was no evidence before the court.

[18] See WIGMORE, EVIDENCE, § 2565.

[19] *Ibid.*, § 2569.

[20] Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 227 U. S. 88 (1913) (*semble*). At page 93 Mr. Justice Lamar, speaking for the court says: ". . . manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."

[21] *E. g.* McBride *v.* McBride, 174 N. W. (N. D.) 870 (1919); Ford *v.* Ford, 173 N. W. (N. D.) 454 (1919).

[22] Horton *v.* Wright, Barret & Stillwell Co., 174 N. W. (N. D.) 67 (1919).

well feel that little, if any, lasting good will be accomplished by haphazard attempts to break away from justice according to rule. Before rejecting utterly the experience of the past, legal reformers should make a careful study of the ends to be attained, and of the fields in which rule, or discretion, as the case may be, will conserve the most and sacrifice the least of the interests which the law has to secure. Only thus can the courts follow "the path of the law."[23]

RECENT CASES

ALIENS — NATURALIZATION OF ALIENS — STATUS IN THE BRITISH ISLES OF A PERSON NATURALIZED IN AUSTRALIA. — A natural-born German emigrated from Germany in 1878 to Australia, where he resided until 1908, when he was naturalized. Later he went to England and was residing there in 1914. Failing to register as an alien, he was convicted under the provisions of the Aliens Restriction Act of 1914 (see 4 & 5 GEO. V, c. 12). *Held*, that the conviction was proper. *The King* v. *Francis, Ex parte Markwald*, [1918] 1 K. B. 617.

The defendant in the above case brought a proceeding in the nature of a petition for a declaration that he was not an alien. *Held*, that it be denied. *Markwald* v. *The Attorney General*, 36 T. L. R. 197.

For a discussion of these cases see NOTES, p. 962, *supra*.

AGENCY — BROKERS — SECRET AGREEMENT TO POOL COMMISSIONS VOID AS AGAINST PUBLIC POLICY. — In a real-estate transaction a third party brought together the respective agents for a buyer and seller and the three agreed to pool and divide commissions. The seller has paid the commission due into court and the agent of the buyer and the third party each claim one third. *Held*, that the third party can recover, but the agent for the buyer can not. *Williams* v. *Knight Realty Co.*, 217 S. W. 753 (Tex.).

A broker, though an agent in a limited sense, owes the party he represents the same measure of undivided loyalty which the law exacts from an ordinary agent toward his principal. See *Young* v. *Hughes*, 32 N. J. Eq. 372, 383. Consequently he may not put himself in a position where his interests would be adverse to those of his principal. *Quinn* v. *Burton*, 195 Mass. 277, 81 N. E. 257. Thus, he cannot secretly represent two parties with conflicting interests. *Rombeck* v. *Pattillo*, 104 Ga. 777, 30 S. E. 962; *Bunn* v. *Keach*, 214 Ill. 259, 73 N. E. 419. An exception is made where his equivocal conduct is assented to by the principals. There dual agency is permitted. *Rowe* v. *Stevens*, 53 N. Y. 621. There also he may agree to pool commissions with the broker of the other party. See *Sullivan* v. *Tufts*, 203 Mass. 155, 157, 89 N. E. 239, 240. But pooling arrangements made secretly are void, being inimical to public policy. *Quinn* v. *Burton*, *supra*; *Corder* v. *O'Neill*, 207 Mo. 632, 106 S. W. 10. This is so, even though the price of the property is fixed by the principal. *Levy* v. *Spencer*, 18 Col. 532, 33 Pac. 415. These engagements unconsciously tend to subordinate the interests of the principals to the desire to carry through the particular scheme of the brokers. That being the case, the *bona fides* of an individual transaction will afford no excuse. *Smith* v. *Pacific Vinegar Works*, 154 Cal. 352, 78 Pac. 550. Nor will custom. *Walker* v. *Osgood*, 98 Mass. 348. In the principal case the right of the third party is clear. But the agent for the buyer, relying as he did on an illegal contract, could not succeed.

[23] See Oliver Wendell Holmes, "The Path of the Law," 10 HARV. L. REV., 457.